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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

NO. 71-1045

Franz J. Tomasino,
Pertitioner,

v

State of California

Petition
For a Writ of Certiorari
To the
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

John N. Frolich
Attorney for Pertitioner
727 West 7TH Street
Los Angeles, California 90017

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TOPICAL INDEX

Subject	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional, and Rules, Provisions Involved	4
Statement of the Case	5
Reasons for Granting Writ	7
(a) Is a criminal prosecution, removed with "good cause appearing therefor", subsequently remandable without an adversary hearing?	7
(b) Is a Motion, filed in a District Court, which does not comply with said Court's Rule 3(e)1 pertaining thereto, validly before said Court so as to warrant its action thereon?	22
(c) Is a District Court empowered to act ex parte with regard to a Removal Petition, after an adversary proceeding concerning said Petition, is before it?	30
Conclusion	34

Authorities

Cases	Page
Chessman v. Teets 354 U.S. 156	18
Council of Fed. Org. v. Mise 339 F.2d 898	11
Davis v. Mutual Ins. Co. 290 F.Supp. 217	31
Farmers Bank v. ATSF Ry. Co. 25 F.2d 23	13,14
Fed. Trade Comm. v. Sci. Living 150 F.Supp. 495	12
Flowers v. Aetna Casualty Co. 163 F.2d 411	9
Gibson v. Chesapeake Ry. Co. 215 F. 24	14
Gordon v. Bowles 153 F.2d 614	11
Gutensohn v. K.C. So. Ry. 140 F.2d 950	29
In re MacNeil Bros. Co. 259 F.2d 386	31
Jackson v. City of Vicksburg 361 F.2d 473	32
Jackson v. U. S. 295 F.2d 620	8
Kaslo v. City of Meridan 360 F.2d 282	33
Kentucky v. Powers 139 F. 452	20
Link v. Wabash Ry. 291 F.2d 542	26
M. A. Jacobs, Inc. v. Manning Corp. 171 F.Supp. 393	23
Miller v. Reddin 293 F.Supp.	20
Mosher v. Bierne 357 F.2d 638	21
Phillips v. Western Terra Cotta Co. 174 F. 873	14

Authorities, cont'd.

Cases -		Page
Rea v. U. S.	350 U.S. 214	30
Rosecrans v. Wm. Lozier, Inc.	142 F.2d 118	15
Smith v. City of Jackson	358 F.2d 705	15,33
Torquay Corp. v. R.C.A.	2 F.Supp. 841	19
U. S. v. Rosenberg	108 F.Supp. 798	11
Wilson v. Republic Steel Co.	257 U.S. 92	33
Woods Const. Co. v. Atlas Chem. Ind.	337 F.2d 888	26

Statutes -

United States Constitution -	
5th Amendment	4,11,19
14th Amendment	22
United States Code -	
Title 28:	
Section 1254(1)	3
Section 1443(1)	3,6,8,22
Section 1446	6
Title 42:	
Section 1981	19,21,22
U. S. District Court -	3,4,5,6
Local Rule 3(e)1	22,25,26,29
California Vehicle Code -	
Section 23101	5

Books -

Black's Law Dictionary	9,23

IN THE
SUPREME COURT
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No.

FRANZ J. TOMASINO,
Petitioner,
V.
STATE OF CALIFORNIA

PETITION
FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner, FRANZ J. TOMASINO, prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals, for the Ninth Circuit, in the proceedings therein, on November 11th, 1971.

OPINION BELOW

The Opinion, of said Court of Appeals, as yet unreported, is reproduced in Appendix A, as is the Order of the United States District Court, Central District of California, entered on November 13th, 1970.

JURISDICTION

The Opinion and Judgment, of said Court of Appeals, with 1 Dissent, was entered on November 11th, 1971; thereafter, a Petition for Rehearing was filed in said Appellate Court, whereupon, said Court issued its Order, with 1 Dissent, denying said Petition, said Order being entered on December 16th, 1971.

A Hearing was had in said District Court, on the Filing and Spreading of the Appellate Court's Judgment, on January 10th, 1972, at which time said District Court issued its Order staying the Remand to the State court, said Stay-Order being conditioned upon Petitioner's filing the

herein Petition, in this Court, on or before February 10th, 1972.

The jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code.

QUESTIONS PRESENTED

Petitioner removed his Case, before a State court, to said District Court, pursuant to 28 U.S.C. §1443(1), whereupon, said court, determining that "good cause appearing therefor", ordered the State to respond thereto "on or before November 12, 1970"; this, it did by filing a Motion for Remand which did not comply with the requirements of Local Court Rule 3(e)1, and served Petitioner, by Mail, the same day. On November 13th, 1970, said District Court, without according Petitioner a hearing on said Motion, signed the State-prepared Order of Remand, an act that raises the following questions:

(a) Is a criminal prosecution, removed with "good cause appearing therefor", subsequently remandable without an adversary hearing thereon?

(b) Is a Motion, filed in a District Court, which does not comply with said Court's Rule 3(e)1 pertaining thereto, validly before said Court so as to warrant its action thereon?

(c) Is a District Court empowered to act ex parte with regard to a removal Petition, after an adversary proceeding concerning said Petition, is before it?

CONSTITUTIONAL, AND RULES, PROVISIONS INVOLVED

United States Constitution-

5th Amendment -

No person shall...be deprived of life, liberty, or property, without due process of law...

United States District Court Local Rules -

Central District of California -

Rule 3(e)1 -

When there has been an adverse appearance, a written notice of motion shall be necessary...

Any notice of motion...shall be served upon the adverse party, or his attorney, and filed with the clerk of this court not later than seventeen days before the day designated in the motion as the hearing date...

STATEMENT OF THE CASE

On or about November 5th, 1970, Petitioner, charged with an alleged violation of Section 23101, California Vehicle Code, in a Case pending in the California Supe-

rior Court, filed, pursuant to 28 U.S.C. §1443(1), a Petition, for Removal of said Criminal Prosecution, in said United States District Court, in full compliance with 28 U.S.C. §1446(a)(c); whereupon, said Federal court, on or about November 6th, 1970, ordered the District Attorney, for said State, to respond to said Petition on or before November 12th, 1970, which he did by serving Petitioner, by mail, as he timely filed, in said District Court, a Response, including a Motion for Remand that did not comply with the mandatory requirements of Local Court Rule 3(e)1, pertaining to Motions and the filing thereof in said District Court.

Simultaneously with the filing of said Response and Motion, an Order of Remand, prepared by said District Attorney, was lodged in said Court.

On or about November 13th, 1970, said District Court, without according

Petitioner a hearing on said Motion for Remand, executed the State-prepared Order of Remand, therewith remanding Petitioner's Case to said State court.

REASONS FOR GRANTING THE WRIT

Petitioner seeks, from this Court, a review on Writ of Certiorari because the Court of Appeals, for the Ninth Circuit, has rendered a decision that -

(1) has so far departed from the accepted and usual course of judicial proceedings,

(2) has so far sanctioned such a departure by the lower court,

as to call for an exercise of this Court's power of supervision.

Petitioner queries -

(a) Is A Criminal Prosecution, Removed With "Good Cause Appearing Therefor", Subsequently Remandable Without An Adversary Hearing Thereon?

The lower court, on November 6th,

1970, issued its "Order On Petition For Removal Pursuant To 28 USC 1443(1)":

> The petitioner having filed a Petition for Removal of Criminal Prosecution pursuant to Title 28, §1443(1), United States Code, and good cause appearing therefor,
>
> IT IS HEREBY ORDERED that the District Attorney, Superior Court of the State of California, in and for the County of Los Angeles, Los Angeles, California file a response thereto on or before the 12th day of November, 1970.

Thus, in its Order, the lower court declared that Petitioner, having filed a Petition for Removal of a Criminal Prosecution, with "good cause appearing therefor", therewith accepted jurisdiction.

"Good cause" has been defined as a -

LEGALLY SUFFICIENT GROUND OR EXCUSE.

Jackson v. United States,

C.A.9 295 F. 620, 622.

According to Black's Law Dictionary, 4th. Edition, the word "legally" is defined as:

LAWFULLY; ACCORDING TO LAW.

So, in effect, the lower court, by its acknowledgement that Petitioner had filed his Petition for Removal with "good cause appearing therefor", i.e., that there was a "legally sufficient ground or excuse" therefor, was removed "according to law", therewith determined that it had jurisdiction of the matter - the matter of removability was then decided, inasmuch as -

THE QUESTION OF REMOVABILITY IS TO BE DECIDED IN THE FEDERAL COURT RATHER THAN IN THE STATE COURT.

Flowers v. Aetna Casualty Co., (1947) 163 F.2d 411.

Upon its ordering the State to respond to said Petition, instead of permitting the State to determine, voluntarily,

its course of action with regard thereto, the lower court so far departed from the accepted and usual course of judicial preceedings, as pertains to the removal of cases, and the Appellate Court's decision has so far sanctioned such a departure, by the lower court, as to call for the exercise of this Court's power of supervision.

And particularly is this so inasmuch as said lower court, by ordering the State to respond to said Petition, a Response having joined thereto a Motion for Remand, forced an adversary proceeding into existence, invoked a Motion procedure, and then foreclosed Petitioner from having a hearing therein by its immediate execution of the State-prepared Order of Remand, thereby denying him of his constitutional right to be heard on said Motion.

THE RIGHT OF A LITIGANT TO BE HEARD IS ONE OF THE FUNDAMENTAL

RIGHTS OF DUE PROCESS OF LAW.

Council of Fed. Organizations v. Mise, (1964) 339 F.2d 898.

Furthermore,

DUE PROGESS REQUIRES COMPLIANCE NOT ONLY WITH THE OUTWARD FORM OF THE LAW BUT WITH ALL THAT IS IMPLICIT IN THE CONCEPT WITH ORDERED LIBERTY AND WITH THE IMMUTABLE PRINCIPLES OF JUSTICE.

United States v. Rosenberg, (1952) 108 F.Supp. 798, aff'd. 200 F.2d 666.

In the lower court, there was no compliance with, or even "lip-service" to, the outward form of the law, said 5th Amendment.

THIS AMENDMENT REQUIRES THAT THERE SHALL BE A HEARING AT WHICH EACH PARTY CAN BE HEARD AND BY VIRTUE OF WHICH A SUBSTANTIAL ENJOYMENT OF HIS CONSTITUTIONAL RIGHTS IS PRESERVED.

Gordon v. Bowles, (1946) 153 F.2d 614.

And, what is more,

> THE "HEARING" NECESSARY TO MEET THE CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS IS A HEARING OF EVIDENCE AND OF ARGUMENT BY THE ONE WHO MUST MAKE THE DECISION.
>
> Fed. Trade Comm. v. Scientific Living, Inc., (1957) 150 F.Supp. 495, aff'd 254 F.2d 598.

The Record shows the blatant disregard, on the part of the lower court, for procedural due process of law as is disclosed by the Declaration of Service by Mail, executed by said District Attorney, whereon is indicated that the Response and Motion to Remand; and Order, was mailed to Petitioner's Attorney on November 12th, 1970, the documents therein designated presumably being delivered on November 13th, 1970, thereby completing service on Petitioner on the same date the lower court executed the State-prepared Order of Remand, therewith conclu-

sively precluding Petitioner from any enjoyment whatsoever of his constitutional rights of "due process of law", either as to his being heard in argument and his presentation of evidence, and of having the lower court hear him therein.

The State, in its Response, took issue with the statements in said Petition, which points up the fact that -

IF THE PLAINTIFF TAKES ISSUE WITH STATEMENTS IN A REMOVAL PETITION, THE ISSUES MUST BE DETERMINED BY THE FEDERAL DISTRICT COURT.

Morris v. DuPont De Nemours., (1934) 68 F.2d 788. See: Farmers Bank v. A.T.S.F. Ry. Co., (1928) 25 F.2d 23.

However, the lower court, by its immediate execution of said Order of Remand on November 13th, 1970, an Order in direct conflict with its previous Order, executed on November 6th, 1970, summarily "determined" said issues, thereby abrogating Petitioner's constitutional rights of Due Process of

Law, contrary to the fact that -

A MOTION TO REMAND WILL BE DETERMINED ON THE SUFFICIENCY OF THE ALLEGATIONS OF THE REMOVAL PETITION.

Farmers Bank v. A.T.S.F. Ry. Co., (1928) 25 F.2d 23.

and that -

A MOTION TO REMAND A CAUSE REMOVED FROM A STATE COURT IS IN THE NATURE OF A DEMURRER, AND GOES ONLY TO MATTERS APPARENT OF RECORD.

Gibson v. Chesapeake & O. Ry. Co., (1914) 215 F. 24.

A MOTION TO REMAND DOES NOT OPERATE AS A GENERAL DENIAL OF THE ALLEGATIONS OF THE PETITION FOR REMOVAL.

Phillips v. Western Terra Cotta Co., (1909) 174 F. 873.

so as to have warranted the lower court's foreclosure of Petitioner's right to a hearing on the Response. Furthermore,

THE MERITS OF A PLAINTIFF'S CLAIM CANNOT BE DETERMINED ON A MOTION TO

REMAND A CAUSE TO A STATE COURT.

Rosecrans v. Wm. S. Lozier, Inc., (1944) 142 F.2d 118.

As pertains to Petitioner's Petition,

GENERALLY, A MERE MOTION TO REMAND DENYING MATERIAL FACTS IS NOT SUFFICIENT TO OVERCOME THE AVERMENTS OF REMOVANT'S WELL-PLEADED PETITION.

Smith v. City of Jackson, (1966) 358 F.2d 705.

* * * * * * *

The Court of Appeals, for the Ninth Circuit, in its affirmance of the lower court's Order remanding Petitioner's Case to the State court, cited Pobuta, Potter, Harmon, and Sanders (see Appendix A, page 2, par. 1), and alleged that he relied thereon in seeking a reversal of said Remand; and declared that, in affirming the lower court's Order, it did not depart from the decisions announced in those cases.

The Potter, Harmon, and Sanders Cases are dissimilar from Petitioner's

Case in that each of them were civil actions filed initially in the Federal District Court, whereas, Pobuta and Petitioner's Cases were removals from State courts. The first three Cases were Civil Rights Cases in which the Appellant, in each instance, had been denied "due process of law", which, in Potter, the Appellant had not been given an opportunity to submit a written opposition to a motion for dismissal, was not given a statement of grounds for the dismissal, and given an opportunity to amend his Complaint so as to overcome its defects; in Harmon, Appellant's Case was dismissed on the court's own Motion because the Complaint failed to state a proper cause of action, without his having an opportunity to be heard; in Sanders, Appellant's Case was dismissed, by the court, without his being given notice that a dismissal of his Complaint - for failure to state a cause

of action - was being contemplated, nor was he given an opportunity to file an opposition thereto.

In Pobuta, the same day that Appellant filed his Petition for Removal in the District Court, it entered a minute-order denying the Petition and remanding his Case to the State court.

However, Petitioner stands in a saliently different position from any and all of them in that the lower court ordered the State to respond, thereby creating an adversary proceeding before it. According to Black's Law Dictionary, 4th Ed., an "adversary proceeding" is defined as -

> "One having opposing parties; contested, as distinguished from an ex parte application; one of which the party seeking relief has given legal warning to the other party, and afforded the latter an opportunity to contest it.

In Petitioner's instance, he was not given a "legal warning" - he was not served with a Notice of Motion, as is the accepted and usual course, in Motion procedure - nor was he afforded an opportunity to contest...two fundamental rights of due process.

About this matter of due process, as pertains to Petitioner's Case, this Court ruled, in Chessman v. Teets, (1957) 354 U.S. 156, 77 S.Ct. 1127, to the effect that -

> THE REQUIREMENTS OF DUE PROCESS MUST BE RESPECTED NO MATTER HOW HEINOUS THE CRIME IN QUESTION MAY BE AND NO MATTER HOW GUILTY AN ACCUSED MAY ULTIMATELY BE FOUND TO BE AFTER GUILT HAS BEEN ESTABLISHED IN ACCORDANCE WITH THE PROCEDURE DEMANDED BY THE CONSTITUTION.

However, the Appellate Court, while having ruled, in Potter, Harmon, Sanders,

and Pobuta, that each of them had been denied the right to be heard, or the equivalent thereof, as well as the right to amend their Complaints - said ruling being without equivocation - in Petitioner's Case, Schneider and Perdue notwithstanding, he was denied the right to be heard, as well as the right to amend his Petition, should it be necessary.

THE FEDERAL DISTRICT COURT HAS THE POWER TO PERMIT THE AMENDMENT OF A PETITION FOR REMOVAL.

Torquay Corp. v. R.C.A.,
(1932) 2 F.Supp. 841.

The action taken against Petitioner, in both the trial and the appellate courts, is in complete derogation of his rights under the "supreme law of the land", the 5th Amendment, as well as under 42 U.S.C., §1981, which provides that -

ALL PERSONS WITHIN THE JURISDICTION OF THE UNITED STATES SHALL HAVE THE SAME RIGHT IN EVERY STATE...TO

SUE, BE PARTIES, GIVE EVIDENCE, AND TO THE FULL AND EQUAL BENEFIT OF ALL LAWS AND PROCEEDINGS FOR THE SECURITY OF PERSONS...

THIS SECTION, SO FAR AS IT CONFERS RIGHTS, IS NOT LIMITED TO NEGROES AND COLORED PERSONS; IT CONFERS RIGHTS ON WHITE PERSONS, AND PUTS IN THE FORM OF A STATUTE WHAT HAS BEEN SUBSTANTIALLY ORDAINED BY THE CONSTITUTION.

Kentucky v. Powers, (1905) 139 F. 452.

The lower court, in Miller v. Reddin, (1968) 293 F.Supp. 216, even declared that -

THE BASIC PURPOSE OF THIS SUBCHAPTER IS THE PROTECTION OF FEDERAL RIGHTS, PRIVILEGES AND IMMUNITIES SECURED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES TO ALL CITIZENS THEREOF AND OTHER PERSONS WITHIN ITS JURISDICTION.

To restate the proposition -

CONSTITUTIONAL AND STATUTORY CIVIL

RIGHTS ARE FOR THE PROTECTION OF PERSONS AGAINST DISCRIMINATORY LEGISLATION OR TREATMENT.

Mosher v. Beirne, (1966) 357 F.2d 638.

Said Section 1981 secures to Petitioner "the same right", as the cited persons, "to sue, be (a) part(y), give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons", and his "constitutional and statutory civil rights" are for his protection "against discriminatory treatment" such as he has received in the lower, and appellate, courts, the dissenting opinion indicating as much, and the lower court inferably concurring therewith by its staying the spreading of the record pending the filing of this Petition in this Court.

It is manifest, from the foregoing, that the Appellate Court has rendered a a decision that has so far departed from

the accepted and usual course of judicial proceedings, that has so far sanctioned such a departure by the lower court, as to call for an exercise of this Court's power of supervision.

- * -

(b) Is A Motion, Filed In A District Court, Which Does Not Comply With Said Court's Rule 3(e)1 Pertaining Thereto, Validly Before Said Court So As To Warrant Its Action Thereon?

Petitioner came before the lower court by a Petition for Removal pursuant to 28 U.S.C. §1443(1) wherein was succinctly stated why he could not enforce, in the State court, his right to "equal protection of the laws" - 14th Amendment - as well as his right "to be subject to like punishment, pains, penalties..." 42 U.S.C. §1981.

Said lower court, having the foregoing facts before it, preambled its

Order to said District Attorney with -

"The petitioner having filed a Petition for Removal of Criminal Prosecution pursuant to Title 28, §1443(1), United States Code, and good cause appearing therefor..." (underscore added)

which, according to Black's Law Dictionary, 4th Ed., page 279, was good "reason; motive; matter of excuse or justification". Petitioner, in other words, by the facts presented in his Petition, had stated a valid ground for the removal of his Case from said State court, and the lower court so decided.

REMOVAL IS EFFECTED ENTIRELY BY AN EX PARTE PROCEDURE, AND A FEDERAL COURT MUSY CLEARLY CONCERN ITSELF AS TO WHETHER OR NOT THERE HAS BEEN A VALID REMOVAL.

M. A. Jacobs, Inc. v. Manning Mfg. Corp., (1969) 171 F.Supp. 393.

As a consequence, the lower court, when stating, in its Order to the State, that Petitioner had filed said Petition with "good cause appearing therefor", that was tantamount to its declaring that he was denied, and could not enforce, in said State court, "a right under any law providing for the equal civil rights of all persons within the jurisdiction" of the United States, and of said State. Thus, did said lower court accept, and acknowledge, jurisdiction - both of the subject-matter, and of Petitioner's person.

However, from that point, on, the procedural handling of Petitioner's Case was deviant.

Instead of permitting the State to determine, on its own volition, whether or not it desired to pursue the matter into the Federal court, said lower court interposed its will and expressly ordered

the State to respond to said Petition "on or before the 12th day of November, 1970", to which Order the State responded, simultaneously therewith filing a Motion to Remand.

Rule 3(e)1, Local Rules, of the lower court, requires that -

> When there has been an adverse appearance, a written notice of motion shall be necessary...
>
> Any notice of motion...shall be served upon the adverse party, or his attorney, and filed with the clerk of this court not later than seventeen days before the day designated in the motion as the hearing date... (underscore added)

THE RULES OF PRACTICE ADOPTED BY THE UNITED STATES DISTRICT COURTS HAVE THE FORCE AND EFFECT OF LAW, AND ARE BINDING UPON THE PARTIES, AND THE COURT WHICH PROMULGATED THEM,

UNTIL THEY ARE CHANGED IN AN APPROPRIATE MANNER.

Woods Const. Co. v. Atlas Chem. Ind., Inc., (1964) 337 F.2d 888.

Said Motion to Remand, as filed by the State, did not comply with the mandatory requirements of said Rule 3(e)1 in that Petitioner, the adverse party, was not served with a "written notice of motion", nor was "any notice of motion filed with the clerk not later than seventeen days before the date designated as the hearing date".

Inasmuch as -

COURT RULES HAVE THE FORCE OF LAW.

Link v. Wabash Ry. Co., (1961) 291 F.2d 542, aff'd. 370 U.S. 626, 82 S.Ct. 1386.

it is patent that, from November 12th, 1970, at 3:59 o'clock P.M., when said Response, with Motion To Remand, was filed, the entire procedure ultimating in an ostensible

remand of Petitioner's Case to said State court, was totally lawless, was totally ineffective to dislodge his Petition For Removal from the lower court because, the lower court had declared the validity of said Removal when it declared that there was "good cause appearing therefor".

An examination of the Preambles to the two Orders, issuing out of said lower court, discloses that it did not seriously consider what the State had prepared for its adoption and signature, the Preamble of the November 6th Order being -

> "The petitioner having filed a Petition for Removal of Criminal Prosecution pursuant to Title 28, §1443(1), United States Code, and good cause appearing therefor..."

and, in direct contrast, the Preamble of the November 13th Order reading -

> "The petition for removal fails to state facts showing that petitioner is

denied, or cannot enforce, in the state courts of the State of California, any rights secured to him by any law providing for the equal civil rights of citizens of the United States within the provisions of Title 28, U.S.C.A., Section 1443."

Inasmuch as the Order of the 6th was prepared by the lower court, itself, whereas, the Order of the 13th was prepared by the State the substance of which completely nullified and reversed its previous Order, the manifest point is that the lower court, by executing the later Order, permitted the District Attorney to put words in its mouth that are directly opposing its previously-declared finding.

A DISTRICT COURT MAY NOT ON ITS OWN MOTION DISMISS A PETITION FOR FAILURE TO STATE A CAUSE OF ACTION, THEREBY DEPRIVING THE PARTIES OF AN

OPPORTUNITY TO BE HEARD ON THE MATTER.

Gutensohn v. K.C.Southern Ry. Co., (1944) 140 F.2d 950.

Conclusion -

(a) The lower court, having opposing papers before it - Petition for Removal and Motion for Remand - did not order an adversary hearing thereon.

(b) The State's Motion for Remand did not comply with certain mandatory requirements of Rule 3(e)1, Local Rules - United States District Court, Central District of California - making it null, without force or effect.

(c) Petitioner did not waive, at any time, said defects.

(d) At no time did Petitioner submit his matter on the Pleadings before the lower court.

Therefore -

Petitioner's Petition For Removal re-

mains before the lower court, unimpaired and unaffected by the events occurring subsequent to November 6th, 1970.

FEDERAL COURTS SIT TO ENFORCE FEDERAL LAW; AND FEDERAL LAW EXTENDS TO THE PROCESS ISSUING FROM THOSE COURTS. THE OBLIGATION OF THE FEDERAL AGENT (JUDGE) IS TO OBEY THE RULES. THEY ARE DRAWN FOR THE INNOCENT AND GUILTY ALIKE. THEY PRECRIBE STANDARDS FOR LAW ENFORCEMENT.

Rea v. United States, (1956) 350 U.S. 214, 76 S.Ct. 292.

- * -

(c) Is A District Court Empowered To Act Ex Parte With Regard To A Removal Petition, After An Adversary Proceeding Concerning Said Petition, Is Before It?

Pertinent to Petitioner's Case -

THE FEDERAL DISTRICT COURT MUST, ON ITS OWN MOTION, MAKE APPROPRIATE

JURISDICTIONAL INQUIRY EVEN THOUGH NO MOTION TO REMAND IS FILED.

Davis v. Mutual of Omaha Ins.Co., (1968) 290 F.Supp. 217.

The lower court, upon the filing of said Petition For Removal, determined its jurisdiction of the matter as is confirmed by its declaring, in its Order, dated November 6th, 1970, to the District Attorney, that Petitioner had filed his Petition in said court, with "good cause appearing therefor", i.e., that said Petition had been filed "according to law".

A DISTRICT COURT WOULD BE UNDER DUTY TO EXAMINE ON ITS OWN MOTION THE QUESTION OF WHETHER A CASE REMOVED TO IT SHOULD BE REMANDED TO A STATE COURT, WITHOUT WAITING FOR A MOTION TO REMAND.

In re MacNeil Bros. Co., (1958) 259 F.2d 386.

The lower court ordered the State

to respond on or before November 12th, 1970, which it did, and, simultaneously therewith it filed a Motion to Remand, whereupon, the lower court summarily executed the State-prepared Order for Remand, even though -

> IT IS INCUMBENT UPON THE DISTRICT COURT WHERE ISSUE HAS BEEN JOINED BY AN ANSWER DENYING THE ALLEGATION IN THE REMOVAL PETITION, TO ASCERTAIN THE TRUTH OF THE ALLEGATIONS THROUGH EVIDENTIARY HEARINGS.
>
> Jackson v. City of Vicksburg, (1966) 361 F.2d 473.

Pertinent to Petitioner's Case -

> A MOTION TO REMAND, OR AN ANSWER DENYING MATERIAL FACTS, IS NOT SUFFICIENT TO OVERCOME A WELL PLEADED AND VERIFIED REMOVAL PETITION IN A CRIMINAL CASE, AND A FULL EVIDENT-

IARY HEARING MUST BE PROVIDED.

Kaslo v. City of Meridan,.
(1966) 360 F.2d 282.

because -

> UNLESS A FULL HEARING IS ACCORDED, A WELL PLEADED AND VERIFIED REMOVAL PETITION IS SUFFICIENT SHOULDERING OF REMOVANTS' BURDEN TO OVERCOME A MOTION FOR REMAND AND ITS SUPPORTING AFFIDAVITS.

Smith v. City of Jackson,
(1966) 358 F.2d 705.

On this very issue, this Court has ruled, in Wilson v. Republic Steel Co., (1921) 257 U.S. 92, 42 S.Ct. 35, that -

> IF A REMOVAL IS EFFECTED, THE PLAINTIFF MAY, BY A MOTION TO REMAND, PLEA, OR ANSWER, TAKE ISSUE WITH THE STATEMENTS IN THE PETITION. IF HE DOES, THE ISSUES SO ARISING MUST BE HEARD AND DETERMINED BY THE DISTRICT COURT (cited cases).

CONCLUSION

Petitioner seeks review on Writ of Certiorari from this Court inasmuch as, from the foregoing it is manifest that the Court of Appeals, for the Ninth Circuit has rendered a decision -

(1) in conflict with the decision of other Courts of Appeal on the same subject;

(2) that has so far departed from the accepted and usual course of judicial proceedings;

(3) that has so far sanctioned such a departure by the lower court;

as to call for an exercise of this Court's power of supervision.

WHEREFORE, for the reasons set forth herein, Petitioner respectfully submits that this Petition for Certiorari should be granted.

John N. Frolich
Counsel for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TOMASINO, Appellant, VS. STATE OF CALIFORNIA, Appellee.	No. 71-1076

(November 11, 1971)

Appeal from the United States District Court for the Central District of California

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Before: MERRILL, KILKENNY, and TRASK, Circuit Judges.

PER CURIAM:

While awaiting trial in a state court, Tomasino filed a petition in the United States District Court for removal of his criminal prosecution to the federal court pursuant to 28 U.S.C. §1443(1). He claimed that the statute under which he was being prosecuted (Cal. Veh. Code §23101) was violative of the equal protection clause because punishment for any particular act could vary from that for a felony (a prison term) to that for a misdemeanor (a jail term plus a fine), depending upon the "whim or caprice" of the court.

The State was ordered to respond, and, upon doing so, moved to remand the case to the state courts. A copy of the response, the motion and a proposed order were served upon Tomasino by mail the same day. The following day, without offering appellant an opportunity to respond to the state's motion to remand, the district judge ordered the cause remanded because the peti-

tion for removal failed to state a claim under §1443(1).

Relying on People v. Pobuta, 437 F.2d 1200 (9th Cir. 1971); Potter v. McCall, 433 F.2d 1087 (9th Cir. 1970); and Harmon v. Superior Court, 307 F.2d 796 (9th Cir. 1962), the appellant seeks reversal. See also Saunders v. Veterans Administration, F.2d---(9th Cir. Sep. 29, 1971). We do not depart from the decisions announced in those cases.

But, there are also complaints filed where under no conceivable stretch of the imagination could a proper claim be stated on amendment. See Perdue v. Supreme Court of the United States, 439 F.2d 806 (9th Cir. 1971). Although Perdue is not a §1443 case, it clearly illustrates the distinction we make here. Likewise, this complaint did not state a cause of action. Were the motion to remand to be heard and amendment permitted, it would still not state a claim upon which relief could be granted. Schneider v. California, 427 F.2d 1178 (9th Cir. 1970), appeal dismissed, cert. denied, (ital) 401 U.S. 929 (1971). Under those circumstances, we do not believe that the appellant is deprived of constitutional rights nor is the administration of justice served by requiring the district court to perform a useless exercise. See Greenwood v. Peacock, 384 U.S. 808, 832 (1966).

The order of the district court is affirmed.

MERRILL, Circuit Judge, dissenting:

I dissent and would remand to the District Court on the authority of People v. Pobuta, 437 F.2d 1200 (9th Cir. 1971), for a hearing on appellant's contentions respecting the propriety of removal. I disagree with the majority in its assertion

that the administration of justice would not be served by such action.

I do not approve of our sanctioning ex parte (ital) action of this sort and do not approve of making this exception to the Pobuta rule, narrow though it may be. Ex parte (ital) action here has forced the aggrieved party to take an appeal in order that his contentions may have judicial consideration. It has forced this court to give consideration to those contentions in the first instance. In my view the administration of justice would be served by our making clear to the District Court that our function is to review its rulings upon appellant's contentions. This we can hardly do when appellant has had no opportunity to be heard.

I would suggest to the district courts that, notwithstanding the result here, the better course is to grant a hearing. In future cases panels of this court may not find the answer on the merits to be as obvious as was the case here.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TOMASINO, Appellant, VS. STATE OF CALIFORNIA, Appellee.	FILED Dec. 16,. 1971 No. 71-1076

Before MERRILL, KILKENNY, and TRASK, Circuit Judges.

Although the petition for rehearing was not timely filed, permission for such late filing is hereby granted.

Judges Kilkenny and Trask join to deny the petition for rehearing. Judge Merrill would grant the petition for rehearing.

The petition for rehearing is denied.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed
Nov. 13, 1970

TOMASINO, Petitioner, VS. STATE OF CALIFORNIA, Respondent.	No. 6885 ORDER REMANDING CASE TO THE SUPERIOR COURT OF LOS ANGELES COUNTY

The petition for removal fails to state facts showing that petitioner is denied, and cannot enforce, in the state courts of the State of California, any rights secured to him by any law providing for the equal rights of citizens of the United States within the provisions of Title 28, U.S.C.A., Section 1443.

IT IS, THEREFORE, ORDERED that this cause be and the same is, hereby remanded to the Superior Court of the State of California, in and for the County of Los Angeles, for further proceedings. The clerk of the court is directed to serve a copy of this order upon petitioner.

Dated:November 13, 1970.

/s/ David W. Williams
United States District
Judge

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1045

FRANZ J. TOMASINO,

Petitioner,

V.

STATE OF CALIFORNIA,

Respondent.

ON PETITION
FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH P. BUSCH
District Attorney
Los Angeles County

HARRY WOOD
Head, Appellate Division

ROBERT J. LORD
Deputy District Attorney

849 South Broadway
Los Angeles, California
Telephone: 624-2761

Attorney for Respondent

TOPICAL INDEX

	PAGES
QUESTION PRESENTED	2 - 3
ARGUMENT	3 - 8
IT IS SETTLED LAW THAT THE UNITED STATES DISTRICT COURTS HAVE DISCRETION TO REMAND SOME CASES WITHOUT HOLDING HEARINGS	
CONCLUSION	8 - 9

LIST OF AUTHORITIES

	PAGES
CASES	
City of Greenwood v. Peacock, 384 U.S. 808	4,7,8
STATUTES	
28 U.S.C. 1443(1)	2
California Vehicle Code section 23101	3

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below and Jurisdiction

The opinions below are included as an

Appendix to the Petition. It also adequately sets out the basis for certiorari jurisdiction.

QUESTION PRESENTED

In respondent's view, the sole question is whether the United States District Court acted properly in remanding, on its own motion and without a hearing, a state criminal prosecution (designated People of the State of California v. Tomasino) to the state courts.

The case had been removed to the United States District Court by petitioner's act of filing a removal petition under 28 U.S.C. 1443(1): i.e., he claimed violation of his Federally protected civil rights.

Nature of the Underlying Criminal Prosecution and Petitioner's Objection Thereto.

This is concisely set out by the majority opinion of the Court of Appeals, which we quote (from first paragraph),

with the additional notation that California Vehicle Codes section 23101 is commonly known as "drunk driving":

> "He [petitioner] claimed that the statute under which he was being prosecuted (California Vehicle Code section 23101) was violative of the equal protection clause because punishment for any particular act could vary from that for a felony (a prison term) to that for a misdemeanor (a jail term plus a fine), depending upon the 'whim or caprice' of the court."

ARGUMENT

IT IS SETTLED LAW THAT THE UNITED STATES DISTRICT COURTS HAVE DISCRETION TO REMAND SOME CASES WITHOUT HOLDING HEARINGS

The People submit that petitioner's

removal petition was clearly lacking in merit. Accordingly, if it is proper for United States District Courts to remand any cases on their own motions, and without holding of any hearing, this case would be an appropriate one for such action.

We submit that this is precisely the sort of unmeritorious removal case which was foreseen in City of Greenwood v. Peacock, 384 U.S. 808, wherein the reasons for allowing summary remand were indicated as follows (at 384 U.S. 832-833; footnotes omitted):

"In the fiscal year 1963 there were 14 criminal removal cases of all kinds in the entire Nation; in fiscal 1964 there were 43. The present case was decided by the Court of Appeals for the Fifth Circuit on June 22, 1965, just before the end of the fiscal year. In that year, fiscal 1965, there were 1,079 criminal

removal cases in the Fifth Circuit alone. But this phenomenal increase is no more than a drop in the bucket of what could reasonably be expected in the future. For if the individual petitioners should prevail in their interpretation of section 1443(1), then every criminal case in every court of every State - on any charge from a five dollar misdemearnor to first-degree murder - would be removable to a federal court upon a petition alleging (1) that the defendant was being prosecuted because of his race and that he was completely innocent of the charge brought against him, or (2) that he would be unable to obtain a fair trial in the state court. On motion to remand, the federal court would be required in every case to Hold a hearing, which would amount to at least a preliminary trail of the motivations of the state officers who arrested and charged the defendant,

of the quality of the state court or judge before whom the charges were filed and of the defendant's innocence or guilt. And the federal court might, of course, be located hundreds of miles away from the place where the charge was brought. This hearing would be followed either by a full trial in the federal court, or by a remand order. Every remand order would be appealable as of right to a United States Court of Appeals and, if affirmed there, would then be reviewable by petition for a writ of certiorari in this Court. If the remand order were eventually affirmed, there might, if the witnesses were still available, finally be a trial in the state court, months or years after the original charge was brought. If the remand order were eventually reversed, there might finally be a trial in the federal court, also months or years after the original charge was brought."

We submit that, in rejecting a broad construction of the substantive provisions of the removal statute, largely because of the dangers of a flood of meritless petitions (as indicated by the above quotation), City of Greenwood v. Peacock, supra, must also be deemed by implication, to have rejected procedural requirements which could, in effect, negate this construction. For if this court in rejecting a construction of the law which would allow "every case . . . from a minor misdemeanor . . ." to be removed to the Federal courts, we submit it must also, by clear implication, allow some sort of summary remand when meritless cases are removed. For removal occurs automatically, on filing the petition. Thus it must be proper to remand such cases in a summary manner, without a hearing. Surely if every litigant, in even the most minor traffic case, can

make his matter, literally, a Federal case -- then the dangers cited will occur simply by reason of the hearings required to remand these cases. As this procedural construction would establish exactly the state of affairs rejected by City of Greenwood v. Peacock, supra, we submit that this - the procedural construction urged by petitioner, of requiring a full Federal hearing in every case before remand, no matter how lacking in merit the removal was, must also be deemed to have been rejected by this Court.

CONCLUSION

We submit that, as the claim urged by petitioner has already been rejected by this Court by very clear implication, this case does not present a legal issue warranting grant of certiorari.

Accordingly, it is requested that the petition for the writ be denied.

Respectfully submitted,

JOSEPH P. BUSCH
District Attorney
Los Angeles County

By

HARRY WOOD
Head, Appellate Division

ROBERT J. LORD
Deputy District Attorney

Attorney for Respondent

SUPREME COURT, U. S.

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term
1971

No. 71-1045

FRANZ J. TOMASINO,

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V.

STATE OF CALIFORNIA

PETITIONER'S REPLY BRIEF

ON PETITION
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JOHN N. FROLICH
727 West 7th Street
Los Angeles, California
Attorney for Petitioner

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Petitioner, in reply to Respondent's Brief in Opposition, alleges that the matter therein presented should be totally disregarded because it is non-responsive to the questions he has raised in his Petition.

An instance in point -

In its Brief, as regards the "question presented", it states:

> "In respondent's view, the sole question is whether the United States District Court acted properly in remanding, on its own motion and without a hearing, a state criminal prosecution (designated People of the State of California v. Tomasino) to the state courts." (underscore in quotation) (Resp.Br.,p.2)

While Petitioner concedes that power exists for a District Court to remand a removed Case ex parte, i.e., on its own Motion. in the matter before this Court, the lower court expressly waived its authority to act ex parte when it ordered the State to respond (Pet.,p.3), thereby changing the status of said removed Case proceeding from an ex parte one, to an adversary one that requires a Hearing (Pet.Br.,pp.10-11).

Obviously, Respondent has not placed before this Court, in any manner, or form, any "opposition" whatsoever to Petitioner's Questions (a), (b), and (c), as set forth on page 4 of his Petition.

Instead, Respondent makes the bald, unsupported, statement, in opening its Argument, on page 3 of its Brief, that -

> "The People submit that petitioner's removal petition was clearly lacking in merit. Accordingly, if it is proper for United States District Courts to remand any cases on their own motions, and without holding of any hearing, this case would be an appropriate one for such action."(underscore in quotation)

What Respondent thus states is petitio principii - fallacious in that what is to be proved is implicitly taken for granted, i.e., the fallacy of assuming,

in the premise, the conclusion that is to be proved!

Thereafter, acting upon its assumption that its statement "that petitioner's removal petition was clearly lacking in merit", Respondent has proceeded to represent to this Court meaningless statistics, insofar as proving or disproving Petitioner's position, drawn from Greenwood v. Peacock, 384 U.S. 808, pertaining to a proliferation of the removal of cases in support of the allowance of "summary remand".

Be that as it may, all of the matter presented on pages 4 through 8, of Respondent's Brief, has thrown neither light nor shadow on the matter that Petitioner has placed before this Court, in his Petition. Respondent has neither proved nor disproved any thing - just a vapid gyration.

Consequently, Respondent's conclu-

sion, on page 8, of its Brief, is a further instance of petitio principii,

> "We submit that, as the claim urged by petitioner has already been rejected by this Court by very clear implication, this case does not present a legal issue warranting grant of certiorari".

Here, without, in any manner, showing that Petitioner's Case, involving, as it does, a situation demanding a Hearing in an adversary proceeding, comes within the sweep of the cited statistics, but presumes that, because his Case was removed from a State court, it automatically comes under the frown of this Court, is totally without merit.

Respondent can not be serious in urging that this Court deny Petitioner certiorari solely upon the "dictum" drawn from Greenwood, supra, and upon nothing more. Herein presented is a a point of constitutional law, i.e.,

the granting or denial, to Petitioner, of "due process of law" secured to him under the 5th Amendment, United States Constitution.

To Petitioner, it appears that a more cogent question, than he has herein set forth, is: Under the Constitution, is the court, after having one side of a Case presented to it, and ordering the opposition thereto, to be permitted to decide the issue "in camera"...within the recesses of his skull?

Petitioner respectfully directs this Court's attention to a fact, ignored by Respondent, that Greenwood, supra, was remanded because the attempted removal thereof was based upon the 1st Amendment, of said Constitution, which this Court ruled that the rights thereunder "are not rights arising under a law providing for 'equal civil rights' within the meaning of §1443(1)".(p.825)

WHEREFORE, inasmuch as Respondent has ~~failed to oppose~~, in any valid manner, Petitioner's Petition for a Writ of Certiorari, he requests that his Petition be granted.

Respectfully submitted,

John N. Frolich-
Attorney for Petitioner